BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY SHEPARD Claimant VS. **CENTRAL INDUSTRIAL PLASTICS, INC.** Respondent AND **INSURANCE COMPANY OF NORTH AMERICA** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 157,161

ORDER

ON the 26th day of April, 1994, the application of the claimant filed March 16, 1994, and the application of the respondent filed March 18, 1994, for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated March 14, 1994, came on for oral argument in Chanute, Kansas.

APPEARANCES

The claimant appeared by and through her attorney, David L. McLane of Pittsburg, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Vincent L. Burnett of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Raymond W. Radford of Chanute, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the March 14, 1994 Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the March 14, 1994 Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Whether claimant met with personal injury by accident arising out of and in the course of her employment with respondent on May 9, 1991.

(2) Whether the treatment of Dr. Phillip Middleton shall be paid by the respondent as authorized medical expense.

(3) What is the nature and extent of claimant's disability, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of facts and conclusions of law:

(1) Claimant has proven by a preponderance of the credible evidence that she suffered personal injury by accident arising out of and in the course of her employment with the respondent on May 9, 1991.

Claimant, a fifty-nine (59) year old production worker, began working for the respondent on September 17, 1990. On May 9, 1991, she was transferred, for the first time, to the knife sheath machine. Working on this machine required claimant bend repeatedly in order to pick up plastic knife sheaths off the floor after they were formed in the machine. Claimant had never worked this particular machine before and had never had to repetitively bend to the floor on any of the other machines she had worked on for respondent. Claimant alleged she was required to bend every eighteen (18) seconds in order to pick the product up off the floor. Respondent provided two (2) witnesses who contradicted claimant's testimony. Kay Hitchcock, an owner of the respondent, provided information to indicate claimant only bent over every ninety-six (96) seconds in order to pick the knife sheaths off the floor. Danny Burns, claimant's supervisor, felt that claimant's estimate of every eighteen (18) seconds was too fast and Kay Hitchcock's estimate of ninety-six (96) seconds was too slow. He indicated claimant would be required to pick the product up off the floor approximately every forty-five (45) seconds to one (1) minute.

The Appeals Board finds that claimant was required repetitively to pick products up off the floor for several hours on the date of injury. Regardless of how often, claimant, after repetitively bending on the date of injury, developed a bad backache from the middle of her back to just below her waist.

The next morning claimant was scheduled for an examination with Dr. Middleton to have stitches removed from her finger. Dr. Middleton had been authorized by the respondent to treat claimant's finger. Claimant called Dr. Middleton's office and requested that the appointment time be moved from 4:15 in the afternoon to sometime in the morning due to her ongoing back problems. After his examination of the claimant, Dr. Middleton contacted respondent company and advised them that claimant was unable to come into work due to the back difficulties she was suffering. Dr. Middleton felt that since he was the company doctor he was not in a position to allow her to return to work in the condition she was in on May 10th. At that time claimant was in severe pain and walked with a limp. She had difficulty bending at the waist and had further difficulty climbing on and off the examination table. Claimant tilted to the side when she walked and had severe tenderness in the midline of both flanks. Claimant's straight leg raise was positive. When claimant was examined on May 1, 1991, she had no difficulty climbing on and off of the examination table and was not limping or tilting to the side.

Dr. Middleton continued to treat the claimant through May and June 1991, for low back pain and left hip pain. He ordered a CT scan which was performed in Coffeyville, Kansas. The CT scan displayed minimal posterior bulging at L4-5, slightly more prominent on the left, with no evidence of spinal stenosis or herniated nucleus pulposus. It further identified a marked narrowing at L5-S1 interspace with no significant residual intervertebral disc. The claimant was diagnosed as having degenerative disc disease at L5-S1. Claimant suffered significant radiculopathy into the left lower extremity. Dr. Middleton, when comparing the claimant's CT scan from 1991 with the earlier one taken in 1987, found little or no significant difference between the two. He did identify significant and more severe subjective complaints in 1991 over 1987. The claimant's positive symptoms on the physical exam were more severe in 1991.

Claimant was also examined by Dr. V. C. Patel, an orthopedic surgeon. Dr. Patel had the opportunity to examine claimant in 1987 and again in 1988, for her earlier back problems. He also compared the CT scans from 1987 to the CT scans in 1991. He failed to see any significant difference between the two CT scans but did describe a significant difference in the subjective complaints of the claimant. In the April 1988 discharge summary, claimant's straight leg test was normal and she had no neurological deficits on physical examination. Diagnosis at that time was chronic muscular strain without radiculopathy. In 1991, claimant walked with a limp and her straight leg raise was positive on the left side. In 1987, claimant's complaints were on the right side. Those complaints did resolve. In 1991, claimant had numbness and tingling with some paraesthesia in the left lower extremity.

Claimant was referred to Dr. John R. Smithson, Jr., a board-certified neurosurgeon, by Dr. Patel. Dr. Smithson first examined claimant on July 29, 1991. Claimant suffered subjective numbness which conformed to the nerve distribution on the first sacral nerve. Claimant's straight leg raise was positive on the left side, again coordinating with the numbness pattern of the L5-S1 nerve. Dr. Smithson recommended a lumbar myelogram which, when performed on July 30, 1991, appeared to be normal. The CT scan confirmed osteoarthritic changes and narrowing of the disc spaces at L5-S1. Claimant had minimal bulging at L4-5. He felt her complaints were consistent with osteoarthritis, neuritis and neuroglia with the irritation of the nerve explaining the radiculopathy. He felt that the degenerative arthritis was not related to her injury but may have been aggravated by the injury. The problems involving back pain, nerve irritation and subjective numbness in the leg were related to her on-the-job injury.

In his practice Dr. Smithson has seen people with pre-existing arthritic conditions where the arthritis was aggravated by trauma. In many instances these people were surprised when told they had arthritis because they had no prior symptomatology. He rated claimant at ten percent (10%) permanent partial functional impairment to the body as a whole and advised she avoid repetitive lifting over twenty-five (25) pounds, repetitive bending at the waist and repetitive stooping. He felt she would find it difficult to stand for long periods of time or to sit for prolonged periods of time although a back brace, which he prescribed for her, would help with these activities. He felt thirty to forty-five (30-45) minutes at a time was the maximum for both standing and sitting comfortably. He testified that with these findings on the CT scan his restrictions before 1991 would have been the same as those after 1991. He did agree that he would not have given her the full ten percent (10%) functional impairment in 1987 because she had less subjective complaints in her back and legs. He felt claimant was being honest with him, as did all of the doctors who had the opportunity to examine claimant and testify in this matter.

K.S.A. 44-501(a) states in part:

> "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

In this matter, all three doctors agree that claimant has suffered additional symptomatology as a result of the injury in 1991. She has been assessed a higher functional impairment than she would have received in 1987. While respondent argues the restrictions upon claimant would have been the same in 1987 as those provided in 1991, the Appeals Board finds it difficult to comprehend how claimant's restrictions could have been identical when taking into consideration her more significantly positive findings on physical examination and the significant radiculopathy and numbness in the claimant's lower left extremity in 1991. While claimant may have been subjected to restrictions in 1987, it is clear from her work history that these restrictions had not been followed by the claimant and, until the date of injury, she had not suffered as a result of her failure to follow any restrictions hypothetical or otherwise. The Appeals Board finds claimant has proven by a preponderance of the credible evidence that she suffered accidental injury arising out of and in the course of her employment on May 9, 1991, while employed by respondent.

K.S.A. 1992 Supp. 44-510e(a) provides:

> "There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

In this instance, claimant has been unable to return to employment at a comparable wage or otherwise as a result of the injuries suffered on May 9, 1991. The presumption of no work disability found in K.S.A. 1992 Supp. 44-510e(a) does not apply.

In determining the extent of permanent partial disability, both the reduction of a claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. The statute is silent as to how this percentage is to be arrived at. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

In order to arrive at a percentage, a mathematical equation or formula must necessarily be utilized. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

Claimant was evaluated by two vocational experts in this matter. Ms. Karen Crist Terrill evaluated claimant on behalf of the claimant. Ms. Terrill, after reviewing the medical records on the claimant, found claimant had suffered a sixty-two percent (62%) loss of ability to perform work in the open labor market. In comparing claimant's pre-injury average weekly wage to her post-injury earning abilities, Ms. Terrill found claimant had suffered a seventeen percent (17%) loss of ability to earn a comparable wage. When asked about the impact of similar restrictions before and after the injury, Ms. Terrill advised that while the restrictions were similar, she felt that the testimony of Dr. Smithson indicated the 1991 restrictions were more mandatory while the 1987 restrictions were more elective.

Claimant was examined by Mr. Monty Longacre at the request of the respondent. Mr. Longacre found claimant had suffered a forty-three percent (43%) loss of ability to perform work in the open labor market and, after comparing claimant's pre-injury and post-injury wages, agreed claimant had suffered a seventeen percent (17%) loss of ability to earn a comparable wage.

As it is the function of the trier of fact to decide the accuracy of the testimony and the question of disability (see Tovar, *supra*, at 785-786), the Appeals Board must decide which expert testimony is appropriate in determining claimant's work disability. In evaluating the qualifications of the experts, the Appeals Board finds no justifiable basis for placing greater emphasis on one over another. In giving equal weight to the opinions of Mr. Longacre and Ms. Terrill, the Appeals Board finds that claimant has suffered a fifty-three percent (53%) loss of ability to perform work in the open labor market. In comparing the opinions of both experts regarding claimant's loss of ability to earn a comparable wage, the Appeals Board finds that claimant has suffered a seventeen percent (17%) loss of ability to earn a comparable wage. By averaging the fifty-three percent (53%) loss of ability to perform work in the open labor market with claimant's seventeen percent (17%) loss of ability to earn a comparable wage, the Appeals Board finds claimant has suffered a thirty-five percent (35%) permanent partial general body work disability in this matter.

(2) The medical treatment provided by Dr. Phillip E. Middleton, who in his own deposition identified himself as the respondent's company doctor, is deemed appropriate and authorized medical treatment and his expenses, as well as the expenses of any physicians to whom he referred claimant, are ordered paid by the respondent as authorized medical care.

It is the respondent's obligation under K.S.A. 44-510 to provide the services of a health care provider as may be reasonably necessary to cure and relieve the employee from the effects of an injury suffered on the job. In this instance, claimant sought medical care for a work-related injury from a doctor already authorized for an earlier injury suffered at respondent's employment. The medical treatment provided by Dr. Middleton, as well as his referrals to Dr. Smithson and Dr. Patel, appears reasonable and necessary under the circumstances and the Appeals Board finds same to be the appropriate responsibility of the respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the claimant, Mary Shepard, is hereby granted compensation against the respondent, Central Industrial Plastics, Inc., and its insurance carrier, Insurance Company of North America, and the Kansas Workers Compensation Fund, for a thirty-five percent (35%) permanent partial general body work disability.

Claimant is entitled to 50 weeks temporary total disability compensation at the rate of $136.67 per week in the sum of $6,833.50, followed by 365 weeks compensation at the rate of $47.84 per week in the sum of $17,461.60, for a total award of $24,295.10.

As of November 9, 1994, there is due and owing to claimant 50 weeks temporary total disability compensation at the rate of $136.67 per week in the sum of $6,833.50, followed by 133 weeks permanent partial general body work disability at the rate of $47.84 per week totalling $6,362.72, in the sum of $13,196.22 due and owing in one lump sum minus any amounts previously paid. Thereafter claimant is entitled to 232 weeks permanent partial general body work disability at the rate of $47.84 per week in the sum of $11,098.88, until fully paid or until further order of the Director.

In all other regards, as it does not contradict this Order, the Award of Special Administrative Law Judge William F. Morrissey, dated March 14, 1994, is affirmed.

Claimant's contract of employment with his attorney is approved insofar as it is not in contravention with K.S.A. 44-536.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier and the Kansas Workers Compensation Fund to be paid 50% by the respondent and its insurance carrier and 50% by the Kansas Workers Compensation Fund per the stipulation of the parties, to be paid as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Debra D. Oakleaf	
Transcript of Preliminary Hearing of 7/19/91	$221.60
Karen Starkey	
Transcript of Preliminary Hearing of 2/13/92	$65.50
Don K. Smith & Associates	
Deposition of Danny Burns	$252.75
Deposition of Mary A. Shepard of 7/24/91	$121.75
Deposition of Kay Hitchcock	$154.75
Deposition of Phillip E. Middleton, M.D.	$284.75
Rick L. Congdon	
Deposition of Mary A. Shepard of 12/17/92	Unknown
Deposition of Karen Crist Terrill	Unknown
Bartlesville Reporting Service	
Deposition of John R. Smithson, Jr., M.D.	$307.40
Heather A. Lohmeyer	

Deposition of V.C. Patel, M.D.	Unknown
Satterfield Reporting Service Monty D. Longacre	$322.65

IT IS SO ORDERED.

Dated this ____ day of November, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David L. McLane, Pittsburg, Kansas
Vincent L. Burnett, Wichita, Kansas
Raymond W. Radford, Chanute, Kansas
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director